Office-Supreme Court, U.S.
FILED
AUG 25 1983
ALEXANDER L. STEVAS,
CLERK

83-356

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JOSEPH J. REY, SR.
Petitioner

vs.

UNITED STATES OF AMERICA
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RAYMOND C. CABALLERO
BARBARA MASSE
521 Texas Avenue
El Paso, Texas 79901
(915) 542-4222
ATTORNEYS FOR PETITIONER

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JOSEPH J. REY, SR.
Petitioner

vs.

UNITED STATES OF AMERICA
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RAYMOND C. CABALLERO
BARBARA MASSE
521 Texas Avenue
El Paso, Texas 79901
(915) 542-4222
ATTORNEYS FOR PETITIONER

NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

JOSEPH J. REY, SR.
Petitioner

vs.

UNITED STATES OF AMERICA
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

QUESTIONS PRESENTED

1. Whether it is required that a defendant admit every essential element of the crime, including mens rea, in order to raise the defense of entrapment.

2. Whether the failure of the Government to produce any evidence of predisposition on the part of Petitioner

to sell drugs constituted entrapment as a matter of law.

3. Whether, given the lack of predisposition on the part of Petitioner, the Government denied Petitioner due process by making repeated and insistent contacts with a petitioner who, the Court of Appeals conceded, had a "lukewarm" attitude toward the transaction.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Authorities	iv
Opinions Below	2
Jurisdiction	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	16
Conclusion	21
Appendix A	
Appendix B	
Appendix C	

LIST OF AUTHORITIES

Cases:	Page
Hampton v. United States, 425 U.S. 484 (1976)	18,19
Henderson v. United States, 237 F.2d 169 (5th Cir. 1956)	15
Sears v. United States, 343 F.2d 139 (5th Cir. 1965)	15
Sherman v. United States, 356 U.S. 369 (1958)	17,18 19
Sorrells v. United States, 287 U.S. 210 (1932)	17,18
Tatum v. United States, 190 F.2d 612 (D.C. Cir. 1950)	11
United States v. Brooks, 611 F.2d 614 (5th Cir. 1980)	15
United States v. Demma, 523 F.2d 981 (9th Cir. 1975)	15
United States v. Hammons, 566 F.2d 1301 (5th Cir. 1978)	10
United States v. Harrell, 436 F.2d 606 (5th Cir. 1970)	15

United States v. Mayo,
705 F.2d 62
(2nd Cir. 1983) 14

United States v. Nicoll,
664 F.2d 1308
(5th Cir. 1982) 15

United States v. Rey,
641 F.2d 222
(5th Cir. 1981) 5

United States v. Rey,
706 F.2d 145 (1983) 2

United States v. Rey,
454 U.S. 861 (1983) 5

United States v. Russell,
411 U.S. 423 (1973) 18,19

United States v. Valencia,
645 F.2d 1158
(2nd Cir. 1980) 14,15

United States v. Young,
464 F.2d 160
(5th Cir. 1972) 11

Statutes:

21 U.S.C., §841 3,10
§843 3
§846 3

28 U.S.C., §1254 2

U. S. Const., Amend. V 2

NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

JOSEPH J. REY, SR.
Petitioner

vs.

UNITED STATES OF AMERICA
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioner, JOSEPH J. REY, SR., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, pp. A1-8) is reported at 706 F.2d 145. There was no opinion issued by the District Court.

JURISDICTION

The opinion of the Court of Appeals was entered on May 16, 1983 (Appendix A, pp. A1-8). The Court of Appeals denied the application for panel rehearing and rehearing en banc on July 26, 1983 (Appendix B, pp. B1-2). This Court has jurisdiction to consider the case under Section 1254(1) of Title 28, United States Code.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The fifth amendment to the United States Constitution provides in part as follows: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

1. Petitioner JOSEPH J. REY, SR., a 63-year-old immigration lawyer, and codefendant Edmundo Lozano were indicted jointly for conspiracy to possess with the intent to distribute heroin, a Schedule I controlled substance, in violation of Sections 841 and 846, Title 21, United States Code (Count 1). REY was also charged alone with the use of a telephone to facilitate the commission of a felony, namely possession with the intent to distribute heroin in violation of Section 843(b), Title 21, United States Code (Counts 2 through 5). Lozano was charged alone in three additional telephone counts (Counts 6 through 8).

Lozano entered a plea to one of the telephone counts and thereafter testified in the cases for the Government.

The other charges against him were dismissed.

Petitioner proceeded alone to jury trial on the five counts of the indictment pertaining to him. The Honorable William S. Sessions, United States District Judge, presided. The trial court granted Petitioner's motion for judgment of acquittal on Count 2 before the case went to the jury. The jury then found Petitioner guilty on the remaining counts, but the trial judge entered a judgment of acquittal, post verdict, on Counts 4 and 5, leaving the conviction as to Counts 1 and 3, the conspiracy and one telephone count.

Thereafter, on motion of Petitioner with the Government's concurrence, a new trial was granted as to Counts 1 and 3. Petitioner thereafter filed a plea in bar and motion to dismiss which the court denied. An appeal was perfected,

and in United States v. Rey, 641 F.2d 222 (5th Cir. 1981), a panel of the Court of Appeals dismissed the appeal in part and affirmed the decision of the trial court in denying motions for judgment of acquittal on two counts. The Supreme Court denied a petition for writ of certiorari. 454 U.S. 861.

Thereafter, in August, 1982, Petitioner was retried on Counts 1 and 3. The trial court, now the Honorable Harry Lee Hudspeth, granted the motion for judgment of acquittal on Count 3. The jury was unable to reach a verdict on Count 1 and a mistrial was declared. Petitioner was then retried on Count 1 in October, 1982, and was convicted. The court sentenced Petitioner to serve four years in prison and to pay a fine of $5,000.00. On May 16, 1983, the Court of Appeals affirmed the judgment

of the district court and rehearing was denied.

2. In affirming the conviction the Court of Appeals held that an accused may not raise the defense of entrapment unless each and every essential element of the crime, including mens rea, is admitted. The court then refused to consider Petitioner's complaints regarding the entrapment case.

3. The evidence at all three trials essentially showed without dispute that Petitioner had no prior relationship to drug trafficking in any respect. The Government informer had been working on and off for the Government for many years. The informer had in 1971 sought Petitioner's services in an unsuccessful attempt to secure lawful residence in the United States for the informer and his family. It seems that the file simply needed

further documentation. According to the evidence, the informer made his living by being an unofficial police employee and informer in Mexico, where he engaged in bribery and extortion.

In June, 1979, the informer contacted REY ostensibly to work on securing immigration permits. According to the transcripts of tape recorded conversations, the informer then stated that he called Petitioner and told him he, the informer, had some "chiva" (a slang word for heroin).[1] REY, who did not know the slang term for heroin, thought it meant cocaine. REY then told an employee of his, codefendant Edmundo Lozano, to look into the matter so they could furnish the information to the

---

[1] At trial the informer contradicted what he said several times on tape and contended that REY was the one who first mentioned the heroin transaction.

Government. REY pretended to be an interested purchaser. REY did make several attempts at that time to contact the United States Attorney, all without success. At that point, after the delivery by the Government of a minute sample of heroin to Lozano, REY attempted to terminate the transaction. Nevertheless, the informer called REY more than 20 times. All REY did was to give Lozano's home phone number to the informer and warn Lozano that he could get into serious trouble. With no further communication from him, Lozano, a former addict, under continuous pressure from the informer agreed to take delivery of some four ounces of heroin in return for a $500 check on a Mexican bank, a deal Lozano did not feel he could refuse. The "heroin" delivered by the Government was bogus. (A

detailed factual statement is attached hereto as Appendix C, pp. C1-45.)

3. The evidence in the case was largely undisputed. Petitioner did contend lack of criminal intent in this attempt by the Government to sell heroin, but he did not dispute the remainder of his involvement.

4. Apparently because of its holding regarding the necessity of admitting the offense before entrapment could be raised, the Court of Appeals did not address the fact that the informer admitted, more than once, that it was he who first mentioned heroin. Nor did the Court of Appeals address the total lack of evidence as to Petitioner's alleged predisposition regarding drugs.

5. The federal court here had jurisdiction to hear the case by virtue of a federal indictment alleging the

Pages misnumbered in original copy.

violation of Section 841(a)(1) of Title 21, United States Code.

REASONS FOR GRANTING THE WRIT

1. This case presents, squarely, the question whether an accused must be obligated to admit all essential elements of the crime, including mens rea, in order to rely on the defense of entrapment.

It has long been the case, in state as well as federal trials, that if the evidence raised any theory upon which a defense could be based, then a court, upon request, was obligated to instruct a jury on the defensive theory. In United States v. Hammons, 566 F.2d 1301, 1302 (5th Cir. 1978), vacated in 439 U.S. 810, the court stated the general principle relating to instructions on defensive theories:

> We must view this case under defendant's version of the facts, for "defendant

> [was] entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility." [Emphasis added]

See also United States v. Young, 464 F.2d 160, 164 (5th Cir. 1972); and Tatum v. United States, 190 F.2d 612, 617 (D.C. Cir. 1950).

It is not uncommon in a criminal case for the evidence to provide more than one alternative for the fact finder: for example, in a murder case, for the accused to argue that he did not commit the murder, but if he did, that it was done in self-defense.

The defense of entrapment is nonconstitutional and is rooted in notions of fair play, estoppel, and public policy. It is possible for the state of the evidence in a case to provide the basis for the defense of

entrapment without the admission of each and every essential element by the accused. This is so simply because by pleading not guilty, each and every essential element is disputed as a matter of law.

In this case there were three trials. At each trial the informer was recorded as having admitted that it was he in effect who first proposed the drug transaction. On the stand the informer said it was Petitioner's idea. Under those circumstances, the evidence supports the defense even though the evidence was inconsistent. Petitioner testified at his first two trials, but not at the third. Whether he testified or not does not alter the fact that evidence, apart from his testimony, could support the theory of entrapment.

This Court has never written on this issue, and the Courts of Appeal are

divided and undecided on the issue. In the words of the Court of Appeals for the Second Circuit, after noting its own conflicting decisions on the issue:

> Subsequent cases in this circuit have treated this as an open question. * * *
>
> The other circuits are both literally and figuratively spread all over the map on this question. Indeed, several circuits have either modified or completely changed their positions during the last decade. The First, Third, Seventh, and Tenth Circuits have never permitted a defendant to raise inconsistent defenses, while the District of Columbia and Fourth Circuits have consistently permitted such defenses. The Ninth Circuit used to prohibit inconsistent defenses, but now permits them. The Sixth Circuit has gone in the opposite direction, since it used to allow them, but now apparently prohibits them. The Fifth Circuit generally does not permit inconsistent defenses, but has created several exceptions and has begun to question the propriety of the general ban. Finally, the Eighth Circuit like the Second leaves the question undecided

> despite earlier cases indicating inconsistent defenses were impermissible.
>
> In this situation, where the circuits appear to be in conflict, our own cases are not altogether consistent, and the Supreme Court cases do not address the question, we hold that William Valencia, having put the Government on notice in counsel's opening statement of the assertion of the dual defenses of entrapment and non-involvement, is entitled to raise the defense of entrapmment since he did not take the stand to deny personally his participation in the transaction and did not affirmatively introduce any other evidence that he was not involved.

United States v. Valencia, 645 F.2d 1158 (2nd Cir. 1980). Three years after Valencia the Second Circuit is still undecided about the necessity of giving an entrapment instruction where it is a consistent defense. United States v. Mayo, 705 F.2d 62, 73 (2nd Cir. 1983).

There are therefore three different lines of authority. First, under one

line of cases a defendant may raise entrapment even if it is inconsistent. United States v. Demma, 523 F.2d 981 (9th Cir. 1975) (en banc). Second is the line that one may raise the defense of entrapment without admitting all elements of the crime and so long as the denial is not inconsistent. Valencia, supra, and several Fifth Circuit cases, including Henderson v. United States, 237 F.2d 169 (5th Cir. 1956); Sears v. United States, 343 F.2d 139 (5th Cir. 1965); and United States v. Harrell, 436 F.2d 606 (5th Cir. 1970), cert. denied, 409 U.S. 846. The third line is those cases which require a defendant to admit every essential element before entrapment may be raised. United States v. Nicoll, 664 F.2d 1308 (5th Cir. 1982); and United States v. Brooks, 611 F.2d 614 (5th Cir. 1980). As this Court can see, the Fifth Circuit clearly falls

into the second and third lines of cases.

2. This case is the appropriate vehicle to settle this very unsettled area of the law on a very important issue. This is, therefore, a case of national importance. This case provides the perfect vehicle to settle the law in this area for several reasons. One is that because there were three trials involved, in one case there is presented to the Court facts under which all lines of authority may be settled, for we have in this case both a consistent and a possible inconsistent defense raised.

3. Moreover, this is a case in which the Government concedes that it was the seller of heroin. This is not a case where the accused simply made the assertion that the contraband was supplied by the Government or its informer.

Entrapment was established as a defense in federal courts not as a constitutional principle, but rather as an exercise of the supervisory power of the courts over federal conduct in federal prosecutions. Sorrells v. United States, 287 U.S. 210 (1932). The law of entrapment in federal courts is established on the basis of the decision of the Supreme Court in Sherman v. United States, 356 U.S. 369 (1958), and it remains unchanged to this day. In Sherman this Court held that a person would be entrapped if the crime was the creative activity of the Government and a person was not predisposed to commit the act. Predisposition must be proven by the Government.

It is often erroneously held that the law of entrapment as set out in Sorrells and Sherman has been changed by the later decisions of this Court in

United States v. Russell, 411 U.S. 423 (1973); and Hampton v. United States, 425 U.S. 484 (1976). But Russell and Hampton were not entrapment cases. In both Russell and Hampton this Court held that the defense of entrapment was unavailable because both defendants conceded that they were predisposed to commit the crime. The decisions of Russell and Hampton concern claims that even if entrapment was unavailable, prosecution in those cases should be barred on due process grounds.

Some courts have misunderstood Russell and Hampton to dilute the holdings of Sorrells and Sherman. They do not. Some have read Russell and Hampton to relieve the prosecution of its burden to prove predisposition. They do not.

The courts below need the guidance of this Court. Because Hampton was such

a divided decision, no clear direction has been given to the courts since the Sherman decision in 1958, a period of some 25 years during which all the drug laws and drug investigations have undergone drastic change.

4. In Russell and Hampton, supra, this Court left open the question whether in the future there might arise a case where the Government so overreached that its conduct would constitute a due process violation.

In this case Petitioner submits that the following factors establish this as a case in which, either under due process or under the court's supervisory powers, prosecution should be barred:

1. This was a defendant with no indication of any prior involvement;

2. The Government produced no evidence of predisposition;

3. The Government at all times was to be the seller of drugs;

4. Defendant did not know the difference in slang terms between heroin and cocaine;

5. The informer in this case made his living some of the time extorting the public in Mexico;

6. Petitioner tried to avoid the informer and the transaction;

7. The informer and the agent attempted to contact Petitioner more than 20 times after Petitioner clearly expressed his disinterest in the case;

8. The evidence shows that Petitioner did not authorize the purchase of any drugs;

9. The Government virtually thrust fake drugs into the lap of a codefendant in return for a $500 Mexican check.

CONCLUSION

For all the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

RAYMOND C. CABALLERO
BARBARA MASSE
521 Texas Avenue
El Paso, Texas 79901
(915) 542-4222
ATTORNEYS FOR PETITIONER

By: _____
RAYMOND C. CABALLERO

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 82-1622

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSEPH J. REY,

Defendant-Appellant.

Appeal from the United States
District Court for the
Western District of Texas

(May 16, 1983)

Before THORNBERRY, GEE, and WILLIAMS, Circuit Judges.

PER CURIAM:

The case presented is hard, though not difficult. Joseph J. Rey, Sr., a veteran El Paso attorney and minor civic leader, stands convicted of conspiracy to possess heroin with intent to

distribute it. For this crime, he has been sentenced to a term of four years imprisonment and a substantial fine. His most serious complaint is that he was entrapped, or perhaps incriminated as a result of outrageous conduct, by government agents. We affirm.

Viewed most favorably to the verdict of conviction, the evidence established that in 1979 Rey received a telephone call from one Uranga, a former client and sometime government informant. Uranga, a shady character with police connections on both sides of the Border, was seeking assistance with immigration problems, Rey's legal specialty. In the course of this conversation, Rey inquired whether Uranga "could get ahold of any drugs for him," later specifying heroin.[1]

---

[1] Uranga's testimony on this point at Rey's two earlier trials, of which more later, was to the same effect.

Uranga replied that he could do so, would get in touch with an unnamed drug source, and would call Rey later. Instead, he reported their conversation to the Drug Enforcement Administration, later agreeing to cooperate in its investigation of Rey. In the days ensuing, Uranga nagged Rey with many telephone calls, met with him on one occasion, and agreed to another meeting. It is fair to say that Rey's attitude appears to have been lukewarm. After postponements, a meeting took place at the Border. In a recorded conversation, Rey asked about the drugs, Uranga replying that two kilograms of 65 percent purity were available at $45,000 each. To this Rey responded that he

knew nothing of drug quality and was only someone who had purchase money. Arrangements were made for further negotiations to be carried on between Uranga and a trusted employee of Rey's, more knowledgeable in such matters. In due course, a drug transaction occurred.

Suffice it to say that the evidence of these later doings and of Rey's indirect participation in them is ample but does not bear significantly on Rey's entrapment/outrageous conduct defense except, perhaps, in one particular. Rey's agent testified that Rey directed him to determine whether Uranga actually had drugs and what their quality was, expressing an intention to turn the information over to the authorities. The record also indicates that he may have entertained thoughts of doing so, but he never did. This is the pertinent evidence.

On it, Rey's claim of entrapment must fail. In the first place, the defense was not available to Rey. It is the law of this circuit that one may not claim he was entrapped into a criminal act without first admitting that he did in fact commit it. United States v. Nicoll, 664 F.2d 1308 (5th Cir. 1982). A criminal prosecution such as this is not a game. It incorporates a moral content and an ultimate concern with guilt or innocence that are inconsistent with permitting the accused to say, "I didn't do it, but if I did, the government tricked me into it." United States v. Brooks, 611 F.2d 614 (5th Cir. 1980). Rey made no such admission. In the second, even were the defense available, the evidence set out above is sufficient to support a rational conclusion that this crime had its birth in the mind of Rey, not in any design implanted there

by the government. This is fatal to Rey's contention, since that is the test. United States v. Webster, 649 F.2d 346 (5th Cir. 1981) (en banc).

The claim of outrageous conduct on the government's part likewise lacks merit. To be sure, once the government learned that Rey was seeking to buy drugs, it pursued offering him an opportunity to do so assiduously. Yet though he appeared to blow hot and cold during that pursuit, Rey -- having broached the matter at the outset -- met with the informant Uranga, procured an agent to pursue negotiations with him, expressed concern and the need for expert advice regarding price and quality of the drugs, and followed the transaction through conferences with his agent. We perceive no outrage. Cf. Rochin v. California, 342 U.S. 165 (1952).

Rey's next contention is that since the evidence at one or both of two inconclusive earlier trials for this offense was insufficient, his third trial and conviction constituted double jeopardy. In this connection, he claims that our decision of his earlier appeal incorrectly denied him an opportunity to make this claim before being retried. United States v. Rey, 641 F.2d 222 (5th Cir. 1981), following United States v. Becton, 632 F.2d 1294 (5th Cir. 1980). Whenever and however made, the contention fails. Rey does not specify wherein he asserts that the evidence at his earlier trials was insufficient; indeed, he concedes on brief that it was similar in all three. We have examined the three records; in none was it insufficient.

We have also examined with care Rey's other claims for reversal. Only

one merits discussion. Pursuant to Local Rule 500-2, Rey sought to interview his jurors in quest of information upon which to predicate a claim of misconduct. That rule requires leave of court granted upon good cause shown. Rey's motion for leave to do so asserted merely that because he was a well-known attorney there was reason to suspect the introduction of prejudicial information into the jury room. The trial judge found this showing inadequate, and we agree. Rey also attacks Rule 500-2 as invalid on various grounds. We have, however, recently upheld its validity against such attacks as his. United States v. Davila, _____ F.2d _____ (5th Cir., April 25, 1983, sl. op. 4314).

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-1622

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JOSEPH J. REY, SR.,
Defendant-Appellant.

Appeal from the United States
District Court for the
Western District of Texas

ON SUGGESTION FOR REHEARING EN BANC
(Opinion 05/16/83, 5 Cir., 198_,
_____ F.2d _____)
(JULY 26, 1983)

Before THORNBERRY, GEE and WILLIAMS, Circuit Judges.

PER CURIAM:

(X) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be

polled on rehearing en banc (Rule 16), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

S/Thomas G. Gee
United States District Judge

CLERK'S NOTE:
SEE RULE 41 FRAP AND LOCAL RULE 17 FOR STAY OF THE MANDATE

III. FACTUAL STATEMENT

JOSEPH J. REY, SR., was born on February 9, 1920. He worked as a police officer from 1941 to 1944. From 1944 to 1945 he served in the Navy. Upon discharge he attended law school at Southern Methodist University. He was licensed to practice law in December, 1949, and has been in practice since that time (TI[1] 195-198). REY has limited his practice solely to immigration work since around 1976 (TI 199).

The events in question took place during June and July, 1979. The principal players in the drama were REY, just introduced, his codefendant Edmundo Lozano-Alvarez (Lozano), and Alonso

---

[1]TI refers to the transcript of the first trial. TII is a reference to the second trial, and T is for the transcript of the third and last trial.

Uranga-Salas (Uranga), the Government informant.

Lozano is 51 years old (T 157). He was represented by REY on two drunk driving charges during the mid-1960's (TI 199). Lozano had two prior felony convictions, one for possession of heroin and another for mail fraud in 1978. He was not represented by REY on either charge. In early 1979 Lozano called REY for representation in a deportation action initiated by Immigration to deport Lozano on the expiration of his prison sentence. Lozano was at FCI La Tuna near El Paso (T 159). As the events in this case were to unfold, Lozano was released from prison on June 12, 1979, and was taken to the Immigration camp in El Paso for deportation, at which place REY obtained Lozano's release. Lozano was in need of employment, and REY offered Lozano

part-time work as an investigator (T 160). Actually, such work consisted of assisting REY in gathering necessary immigration-type documentation for clients. Lozano's probation officer was informed of the arrangement (T 160-161).

Uranga, though attempting to claim employment as a farm hand and mechanic (T 114, 738, 745), actually was a semi-official employee of various Mexican police agencies as well as an informant for U. S. Immigration and Customs on immigration and drug cases (T 117, 118, 657). Uranga, on direct, claimed to be a legitimate law enforcement officer, showing to the court purported credentials from (1) the Mexican Department of Interior (Gobernacion), an agency involved in investigating alien smugglers (GX 20A), (2) the local police of Guadalupe, Chihuahua, a small Mexican town around 30 miles south and east of

El Paso (GX 20B), and (3) the Chihuahua state rural police (GX 20C). On examining the credentials, the DEA supervisor Robinson agreed the credentials did not appear legitimate to him (T 660). Uranga had been Robinson's informant for about 16 years (T 657). Robinson knew little about Uranga except that Uranga was around Mexican police agencies (T 662).

As early as 1964, Uranga was documented as an informant by U. S. Immigration (DX B). In terms of payment, apparently Uranga was allowed to enter the United States on a parole. Uranga's file contains Immigration paroles for August, 1964 (DX B), March, 1966 (DX A), September, 1969 (DX C), and October, 1978 (DX D).

In 1977, Immigration documented an attempt by Uranga to use a fraudulent credential (DX O). Uranga requested

entry to the United States, claiming to be a reporter for Prensa Mexicana. On questioning, Uranga admitted that he was illiterate but then said that he did the investigating and another person did the writing. He said he covered basically the "criminal elements," writing sensationalist-type articles (DX O). The Immigration inspector wrote: "As both subjects (Uranga and his brother Adan) have a very peculiar background, and seem very enigmatic in their dealings with law enforcement agencies, they both appear to be in positions of having dealings with the 'underground' . . . " (DX O). Uranga claimed in court that he had been a commissioned law enforcement officer of several agencies by 1977 but only claimed to be a press reporter to Immigration, never holding himself out to Immigration as a law enforcement officer. Actually, on

questioning Uranga admitted that even the press pass was bogus. He admitted that he had never worked as a reporter or journalist, and that the press pass was not real but that he simply used it so he would not be "harassed by traffic cops" (T 755). In court, under oath he testified that he had never held himself out to anyone as a reporter (T 755). Indeed, at trial Uranga claimed that he had worked every day before 1979 as a mechanic for his brother in Juarez (T 745).

Instead of working as a mechanic, Uranga worked mostly indirectly for police agencies. The nature of his work was explained. Although Mexican police officers were notoriously low salaried persons, they personally would hire individuals like Uranga as assistants of sorts (T 753, 666). DEA supervisor Robinson explained that such an

assistant is commonly referred to as a "madrina" (godmother). They are paid either by sharing the proceeds of bribery and extortion generated by their police officer employer, or they actually perform the bribery and extortion (T 667) by holding themselves out as officers. In this regard Uranga later admitted that of the three police credentials he had, only one was legitimate, that being for the town of Guadalupe. The second was a courtesy pass so that he would not be bothered by other police agencies (T 748), and the third was just not real (T 752).

When asked if the bogus police credentials were the type of police credentials carried by a "madrina," Uranga's response was:

> Q. Is this what a madrina would carry? You are not a real agent but you are kind of an agent?

A. Yes, this is the kind of thing you get when you go get a job, they give you this kind of things for a few days. (T 752)

Uranga was also asked of his knowledge of the word "mordida," literally "bite," but a commonly used slang term in Mexico for a bribe:

Q. Do you know what a Madrina is?

A. Yes, sir.

Q. Is that what you were?

A. It could be.

Q. Don't you know?

A. It could be because we were not regular officers.

Q. You don't know whether you were a madrina or not?

A. Yes, because -- that could be so because we weren't regular officers under him.

Q. Do you know what mordida is?

A. Sir?

Q. Do you know what a mordida is?

A. Gee, I don't know what it is. I don't know what a mordida would be.

* * *

Q. Has no relation to police work? I'm not talking about a dog bite--

* * *

THE WITNESS: A mordida is a mordida. I wouldn't know what you're talking about.

Although Uranga testified that he had not worked for any Mexican police agencies since 1979, not even once (T 741), and during the time he was allegedly living in El Paso working as a farm hand or as a mechanic (T 741), Uranga was actually in Juarez working once again as a madrina. Jose Ramon Pina-Torron (Pina), a bill collector and former madrina himself, testified that in early 1979 Uranga and one Fernando Macias (also a madrina) went to Pina's

home, holding themselves out to be Mexican Federal Judicial Police. They arrested Pina, accusing him falsely of smuggling aliens (T 776, 777). When they took Pina to jail, Uranga and Macias then took Pina's wallet which contained 2,300 pesos (about $100 then) so they could "give it" to Pina's wife (T 778). Then Uranga and Macias went to Pina's house and told Pina's wife that they, as Mexican Federal Judicial Police officers, needed 3,000 pesos to release Pina from jail. Pina's wife gave them the money and Uranga never mentioned or returned Pina's billfold (T 785). Although Uranga denied doing any kind of police work after 1979, he admitted on cross examination being present when Pina was arrested (T 757).

Candelario Cardenas-Rodriguez (Cardenas) is a street vendor in Juarez. He sells from a pushcart and has been so

employed for 17 years. He has known Uranga for about 10 years, during which time Uranga has been representing himself to be a police officer (T 788-790). Uranga had on numerous occasions threatened Cardenas and did extort money from Cardenas (T 792). On January 15, 1982, Uranga and others again threatened Cardenas, this time brandishing pistols.[2] Uranga falsely accused Cardenas of being an alien smuggler. Cardenas complained to the press, and at trial Cardenas identified a newspaper article regarding the incident (T 793 and Tender 3).[3] Uranga

---

[2]Uranga had previously denied carrying a handgun in his work as a madrina, but did admit carrying a submachinegun for his "employer" (T 747).

[3]On Government objection the newspaper article was not admitted into evidence but is among the exhibits in this record.

was supposedly fired from his "job" as a result of the article (T 793).

DEA supervisor Robinson did not look into Uranga's background, and what little he did know he did not pass along to DEA case agent Licon (T 662).

DEA agent Joaquin Legarreta testified that in 1977 REY attempted to give information to DEA. A person had given REY information, and REY reported to Legarreta the information and wanted the persons arrested. Legarreta told REY that mere information was insufficient and that he needed to have the persons cross into the United States with the drug so that they could be arrested (T 818, 819).

In May, 1971, REY filed with Immigration a petition to classify Uranga's status as a permanent resident (DX O). The petition was approved by Immigration in June, 1971, and was

referred to the U.S. Consulate in Cd. Juarez. The record shows that the State Department at the Consulate held up the issuance of the visa to Uranga pending visa applications for Uranga's children (DX O and TI-206). Although all Uranga needed to do was to file some applications for his children, Uranga became dissatisfied with REY, thought REY had not done anything for him, and no longer communicated with REY except to ask for a refund of the $325 fee he paid and issue an occasional threat against REY (TI 207, 208). The last contact REY had was a call from Uranga in 1977 (TI 208). REY was still willing to finish the work, but Uranga would not listen to REY (TI 209).

With all the foregoing as the background, this case began during the week of June 10, 1979. Due to the fact that Uranga's testimony of what occurred

is inconsistent with what Uranga actually stated in taped conversations, REY's version which is in agreement with the taped Uranga version will be set out as well as the version Uranga gave on testifying.

REY version of initial contacts. REY testified that he had not heard from Uranga for some two years and that Uranga telephoned him during the week of June 10, 1979. Uranga wanted, finally, for REY to finish the immigration work which had been started in 1971 (TI 210). REY agreed to meet Uranga at the port of entry, since Uranga had no permit to cross (TI 211). REY told Uranga to take the documents and papers REY needed to complete the work. REY met Uranga at the international border on June 14 or 15, 1979. Uranga told REY that he, Uranga, was in dire financial straits due to having an injured son in the

hospital. REY asked whether Uranga had the documents and Uranga stated that he forgot because of preoccupation over his son (TI 211, 212). At that meeting, according to REY, Uranga said: "Do you have a man that would be willing to buy chiva so that I can make some money and get my kid out of the hospital?" (TI 212). REY did not know the meaning of the word "chiva" and thought it meant cocaine. Actually, the word "chiva" is a slang term in Spanish for heroin (TI 213). Uranga called the next day and wanted to meet again. They made arrangements to meet on June 20 at the bridge (TI 213-215). When they met, REY again asked Uranga for the immigration papers and Uranga again said he forgot them.

Uranga's Version. Uranga stated that after a number of years of not seeing REY, he called REY on June 14,

1979, in order to have REY arrange for a local border crossing card (T 120). Uranga said REY agreed to arrange for a card but then asked Uranga whether Uranga could obtain drugs for REY. REY said he wanted "heroin" (T 122). Uranga told REY he, Uranga, would have to go to a particular person (T 122).

The basic and critical discrepancy was whether REY mentioned heroin first. We now continue with the factual statement.

June 15, Friday. Uranga called his DEA handler, supervisor J. T. Robinson. Uranga told Robinson that REY wanted heroin. Robinson then arranged for Uranga to meet in Juarez with Agents Licon and Aleman. Licon met with Uranga and was told that REY was interested in purchasing heroin. Licon told Uranga not to contact REY. In spite of the clear instructions, Uranga called REY

after the 15th in order to arrange a meeting on June 20.

Around this time REY told Lozano that a man by the name of Uranga wanted him to purchase cocaine. He wanted Lozano to investigate the matter to the end that they could give the information to the Government to help the Government make a case (T 162). Lozano was to check into the quality and quantity of the drug and to see whether Uranga and his people even had the drug (T 162, 164).

Uranga, without knowledge or permission of Agent Licon, called REY again and arranged for a meeting at the bridge on June 20 at around 6:00 p.m. Agent Licon made arrangements so that he and agent Aleman could surveil the meeting, but no attempt was made to record the meeting (T 512, 520, 521). Agent Licon also instructed Uranga not

to take any immigration papers with him to the meeting (T 524).

June 20, Wednesday. Around 6:00 p.m. Uranga waited at the bridge for REY as Licon and Aleman stood watch from afar. When REY had not appeared by 6:30 p.m., the agents decided to call it a day. Aleman walked to the bridge and told Uranga to go home. As Aleman walked back the block or so distance to the place where Licon waited, Licon saw Uranga "headed south," "crossing the bridge" (T 525, 526).

Unknown to the agents Uranga did not immediately return to Mexico, for although Licon saw Uranga "crossing the bridge" into Mexico, Uranga must have returned to the port of entry station, because he met at 6:45 that evening with REY (T 528). At that unrecorded meeting REY asked for the papers, which Uranga

did not have, and then he and Uranga discussed drugs, so said Uranga.

June 21, Thursday. That morning Licon and Aleman discovered that, contrary to their explicit instructions, Uranga had not gone to Mexico but had actually met with REY once again. Uranga said he had been "confused" by Aleman's instruction to leave the bridge (T 530).

9:11 a.m. Uranga calls REY's office. An attempt was made to record the call but the recorder malfunctioned. Nothing of any substance was discussed except a plan to meet that evening (T 535, 536, and DX A).

6:17 p.m. This was the first recorded contact. Uranga was apparently waiting for REY, who did not appear. REY said he was busy with people in his office. They agreed

that Uranga was to call the next morning from the bridge. Uranga stated: "Yes, at the bridge because this thing is all set and I'm getting anxious" (T 536 and GX 5).

June 22, Friday. Apparently there was a call in the morning but there is no record of it.

3:24 p.m. Uranga calls REY. Uranga said he called but REY was in court. Portions of the conversation were as follows:

REY: Say, is there a way that you may be able to come over?

URANGA: Well, how?

REY: Did you get your wife's papers and all that?

URANGA: Everything.

REY: Alright, do you have all those papers?

URANGA: Yes, also.

REY: OK, why don't you take them over to the bridge?

* * *

URANGA: Yes, ah, what would be a good time?

REY: At about 6:00, no?

URANGA: At 6:00?

REY: Yes. But take with you all the papers so that we can talk.

URANGA: Yes.

They then agreed to meet at 6:00 p.m. that evening at the bridge (T 536 and GX 6).

3:37 p.m. For some reason Uranga called to cancel the 6:00 p.m. meeting. REY was not in.

4:16 p.m. REY was still not in (T 537).

4:28 p.m. REY in. Agreed that Uranga should call REY at 9:15 the next morning (T 537 and GX 6).

June 23, Saturday.

9:12 a.m. Uranga called REY and agreed to meet REY at noon at the bridge. REY said: "Take all the papers with you, eh?" (T 538 and GX 7).

Noon. There was a meeting at the bridge.

URANGA: Hello, how are you? I just, I was in the restroom.

REY: OK.

URANGA: What?

REY: Did you bring the papers?

URANGA: I didn't bring one paper.

REY: Goddamit.

URANGA: It's that, I came for the, for the thing in one trip, for the, it's that the, the -

REY: What is it that we're going to do, then, what do you want to do? (T 538 and GX 8)

REY and Uranga then discussed a drug transaction. REY never, ever proposed

either quantity, quality, or price. Indeed, during this meeting the name of the specific drug was not mentioned, an omission which would become more significant later in the day. Uranga discussed the sale of two kilos at a price of $45,000 per kilo. REY stated he knew nothing about drugs, that he simply had the money, but that he had a person he could trust. They agreed to meet at the Fox Plaza Shopping Center at 4:00 p.m. that day (T 540 and GX 8).

At that time REY told Lozano that Uranga was trying to sell a quantity of cocaine and that Lozano should investigate whether Uranga actually had the drug and determine the quality and quantity. Lozano, a cooperating witness for the Government, never said he was to make a purchase (T 162, 164). REY testified he had no money and no connection (TI 218), and there never

were any other persons besides Lozano and REY. Lozano agreed that REY never mentioned any other persons and that REY never changed his story from being one of an investigation to one of a transaction for REY's benefit (T 208, 209, 215, 222). Lozano said REY knew nothing about drugs (T 209).

4:00 p.m. - Fox Plaza. With REY watching from a distance, Lozano met with Uranga and undercover DEA Agent Ramirez in the parking lot. Ramirez and Uranga were ready to complete a transaction. Of course, Lozano had no money, REY had no money, and Lozano simply wanted to see what Uranga had, if anything. DEA wanted to seize money in this transaction. Lozano asked to see a sample and Ramirez wanted to see the money. When it became apparent that Lozano had no money, Ramirez

began to be upset. Some of the conversation is as follows:

RAMIREZ: Tell him that if he wants to, that if he wants to see the merchandise, how long will you take to get the money?

LOZANO: What?

RAMIREZ: How long will you take for the money?

LOZANO: No, well what, one day.

URANGA: Uff. That's what, that's what the lawyer said, I'll go with the -- prepared with the money and everything, he said.

* * *

LOZANO: Monday we'll see each other and then, you'll give me time to test it, to test them?

RAMIREZ: Yes.

* * *

Lozano was asking to test the drug and Ramirez was demanding money. They then talked about waiting two days until

Monday the 25th to complete the transaction. At this point Ramirez shows Lozano the package and Lozano, expecting to see cocaine, is surprised to see that Ramirez had heroin instead.

RAMIREZ: The deal was with that kid. How long will you take? How long will we take to do it Monday?

LOZANO: What?

RAMIREZ: How long will we take Monday to do it?

LOZANO: No, well, what it takes me to call over there so that they can come over and when I find out what, it's percentage. Don't you have a sample? It's heroin ["carga," another word for heroin.]

RAMIREZ: What?

LOZANO: It's heroin ["carga"], no?

RAMIREZ: Well that's what you wanted, no?

LOZANO: Fucking mother, well that one was talking to me about coke ["coca"].

RAMIREZ: No.

URANGA: No, heroin ["heroina"].

RAMIREZ: Heroin ["carga"].

LOZANO: There it is, man, then I have, a little more time.

RAMIREZ: Goddamit.

LOZANO: Give me one, one, one small sample.

Seeing that they were discussing two different drugs, they agreed to meet again Monday. Ramirez said he would call REY on Monday (GX 8).

Lozano then reported to REY that Uranga and Ramirez had heroin, not cocaine (T 170).

June 25, Monday. That month U. S. Attorney Jamie C. Boyd, an old acquaintance of REY's, had issued a personal call for citizens to report

criminal activity (T 473). It was well known that some lawyers lacked confidence in DEA (T 468). At any rate, REY knew that Boyd was then involved in El Paso in an unusually sensitive grand jury investigation (the Judge Wood case). REY called the district clerk's office to determine when the grand jury was to be in session and learned that the grand jury was in session on the 26th through the 28th of June (TI 232, 233).

11:59 a.m. Uranga called REY. REY was not in and his secretary said he would return in an hour and a half (GX 9).

4:20 p.m. Uranga called REY. During the conversation they discussed what Uranga thought was a misunderstanding. Then Uranga reminded REY that it was he, Uranga, who had

said "chiva," or heroin. The conversation:

URANGA: Yes, no, no. Hey, I had told you that it was heroin ["chiva"], lawyer.

REY: Oh, he also told me that.

URANGA: Yes, that it was heroin ["chiva"], it's, it's heroin ["heroina"], not cocaine ["coca"].

REY: Ah, I understood the other one.

URANGA: No, heroin, heroin ["chiva, chiva"].

REY: Aha. No that's another thing that was also misunderstood.

URANGA: Yes, I told you heroin ["chiva"].

REY: Yes. (GX 9)
(Emphasis added)

They then agreed that Uranga would furnish a sample to Lozano on Wednesday the 27th at 4:00 p.m.

June 26, Tuesday. REY testified that he called Boyd's office and learned that he was in El Paso. REY, who had not talked to Boyd about a case for some five years, was trying to see Boyd that day. He went to the U. S. Attorney's office on the third floor of the courthouse and was unable to locate Boyd. REY was told Boyd was busy with the grand jury. REY was unable to see Boyd on the 26th (TI 233, 234, 235). Thinking, however, that he needed a pretext to be in the U. S. Attorney's office, REY told them that he was there to discuss a Saucedo case with Boyd. Saucedo was the only file REY had pending with the U. S. Attorney's office. It was a civil case. REY was directed to see Assistant U. S. Attorney Mesa, which REY did, and told Mesa he wanted to see Boyd (TI 234 and T 632, 636). Mesa admitted at trial that Boyd

was difficult to reach and that during the three plus years Mesa was with the office, REY only requested to see Boyd on that occasion (T 631).

June 27, Wednesday. During the morning REY learned that Boyd actually kept his office apart from his staff and had quarters on the fifth floor. REY went to Boyd's private office and asked to see Boyd. Boyd's secretary asked for a reason and REY said Saucedo. The secretary said Boyd was busy with the grand jury. She told REY they would call him (TI 238, T636). Later, when Boyd was given the message by his secretary, Boyd instructed the secretary to tell REY to see Mesa about the case (T 649). At 12:45 Boyd's office called REY and told REY to see Mesa about the case (TI 239 and DX N).

REY had already made arrangements to have Lozano see about a sample

(TI 240). After REY learned that he could not see Boyd he decided that he was no longer going to be involved in the case and instructed his help not to accept any further calls from Uranga for him (TI 241, 244, 246).

4:00 p.m. The meeting was held at Fox Plaza with Lozano and it is as follows in its entirety:

RAMIREZ: Is the money ready?

LOZANO: What?

RAMIREZ: Is the money ready?

LOZANO: Yes.

RAMIREZ: Are you sure, I'm not going to -

LOZANO: Yes, no, yes.

RAMIREZ: - wait one week, no.

LOZANO: What? Call him, call him.

RAMIREZ: No, when?

LOZANO: Tomorrow.

RAMIREZ: What do you mean, tomorrow?

LOZANO: Alright, then, this afternoon, then.

URANGA: Well he said that -

RAMIREZ: Hey, we want to do it today.

LOZANO: Alright, then, call him this afternoon.

RAMIREZ: What, what, what, how many minutes?

LOZANO: Twenty minutes.

RAMIREZ: Hey.

LOZANO: What?

RAMIREZ: Should I see you here in thirty minutes?

LOZANO: No, telephone him.

RAMIREZ: Where?

LOZANO: At his office.

RAMIREZ: Do you know the number?

URANGA: Yes.

RAMIREZ: Are you sure?

LOZANO: Yes.

RAMIREZ: Is the money ready?

LOZANO: Yes.

RAMIREZ: Tell him I'll call him in thirty minutes. (GX 10)

Although Lozano let Ramirez and Uranga believe that they were about to complete the transaction that day and that they should call REY within one half hour, the record reveals that REY could not be reached by Uranga until July 9, a period of 12 days, and then only because on instructions of the agents, Uranga made a pest of himself and sat in REY's reception room. The efforts to contact REY after 12:45 p.m. on the 27th were as follows:

1:16 p.m. REY not in. Secretary said REY would return in two hours.

2:17 p.m. REY not in. Secretary said REY would return in two hours.

3:15 p.m. REY actually answers the phone. The recording was then lost but the agent noted that the

secretary still said REY was not in (DX B and T 559).

4:52 p.m. REY not in. Secretary did not think he would be back that day. Uranga stated it was urgent and that he would call back in 15 or 20 minutes (DX B, T 558).

5:22 p.m. REY not in. REY had not called. Uranga said Lozano told him to call in 25 or 30 minutes (DX B, T 560).

June 28, Thursday.

9:21 a.m. REY not in. He was expected to leave for Lubbock. Uranga states again it was urgent he speak to REY (DX C, T 560).

9:59 a.m. REY was on another line and then talked to Uranga. REY said he had not seen Lozano, that Lozano was on his way and for Uranga to call in 30 minutes (DX C and T 561).

11:20 a.m. REY was not in. Office said REY would return around 2:30 p.m. (DX C, T 561).

2:21 p.m. REY not in. Left no messages. Left for Lubbock (T 561, DX C).

June 29, Friday.

11:15 a.m. REY not in. Was in Lubbock (DX E, T 562).

July 2, Monday.

9:00 a.m. (T 562) (There was an error on the times listed on GX 12.) REY in. Says Lozano has not been in to see him yet and that he expects to see him at 10:00 a.m. Uranga even offers to cross over. Uranga says: "And I want something now, now I have a problem now, lawyer." Uranga explained that he needed money because a child of his fell. REY told Uranga to call before

11:00 a.m. as soon as he crossed over. (DX 12, T 562)

10:12 a.m. (DX F states time of call was 10:12 p.m. It was a.m.) Uranga called REY as instructed. REY was out and was not expected to return until 2:00 p.m. (DX F, T 567, 568)

2:12 p.m. REY in court. (DX F, T 567)

3:08 p.m. REY in court. (DX F, T 567)

3:50 p.m. REY in court. (DX F, T 567)

4:10 p.m. REY still out. Uranga says it's urgent. (DX F, T 567).

July 3, Tuesday.

8:54 a.m. REY out. (DX F, T 567)

9:08 a.m. REY out. (DX F, T 567)

9:33 a.m. REY out. (DX F, T 567)

July 4, Wednesday.

9:18 a.m. Call forwarding puts call into REY's home. He was not in. (DX G, T 568).

July 5, Thursday.

? a.m. REY not in. He was in Odessa until Monday, July 9. (DX G, T 570)

July 9, Monday.

9:19 a.m. REY was in but was on his way to court. His secretary said that REY said for Uranga to call at 3:00 p.m. that day. (DX H, T 570)

But rather than take a chance that REY was going to continue to avoid Uranga, Agent Licon testified that he decided to send Uranga, uninvited, to REY's office to be sure Uranga saw REY (T 571). In addition, DEA apparently decided that REY was unwilling or incapable of buying kilo quantities of heroin, so they plan to scale the sale down to one of four ounces.

2:35 p.m. This was a face-to-face meeting with REY. At this time Uranga advised REY that his seller

had departed and had left him four ounces to sell at $1,300 per ounce. REY said four ounces was too little and for Uranga to contact Lozano directly. REY gave Uranga Lozano's phone number. (GX 13, T 571-573)

This was the last contact REY had with Uranga. Although REY said he had no money to make a purchase on the 9th, he had that morning deposited $4,240 (DX M).

Lozano testified that so far as he knew, he was only to check on the existence of the drug and on the quantity and "that's all" (T 186). Before he met with Uranga he could not reach REY because REY was out of the city (T 190).

4:11 p.m. As soon as Uranga left REY's office, he wasted no time calling Lozano. Uranga told Lozano that REY had instructed him to call

Lozano. Uranga said he would call the next morning at 11:00 a.m. and Lozano could pick him up (T 574 and GX 14).

July 10, Tuesday.

10:57 a.m. Uranga called Lozano and agreed to meet at the McDonald's at Fox Plaza (T 575 and GX 15).

11:07 a.m. Lozano and Uranga meet at McDonald's. Uranga was urging Lozano to take a sample from the four ounces, test it, then pay the $1,300 per ounce. Lozano then said: "Well, I need to talk to [REY]." Lozano needed REY's authorization. Uranga then discussed his misunderstanding with REY and stated again that it was he, Uranga, who had mentioned heroin:

URANGA: But I called the Lic.[4] man, I called the Lic. and told him I've got some "chiva" - heroin. * * * And I told him I have this and that and then he said, I'm going to take a person and I said no, strange persons that I don't know, no. You alone directly with me. Then when you went there remember I said.

Uranga then told Lozano to meet with REY and that Uranga should call Lozano at REY's office at 2:00 p.m. that day (GX 16, T 575).

2:19 p.m. Uranga called Lozano. Lozano said he talked to REY, but that REY was too busy. REY told Lozano to go see him after 6:00 p.m. that day (T 581 and DX I). At that point,

---

[4] "Lic." is the abbreviation for the Spanish word "licenciado," meaning lawyer.

without waiting for REY's authorization, Lozano stated that he had his own money and that he had a truck, a pickup. They then agreed to meet. Lozano said: "Since you liked the truck, well we can tie it up anyway" (T 581, DX I). Agreed to meet at 5:00 p.m. that day at McDonald's.

2:50 p.m. Uranga called Lozano, but Lozano was out (T 584 and DX I).

2:53 p.m. Uranga called Lozano. Told Lozano that they had agreed to meet at 6:00 about the truck deal. They then changed the meeting to the next day at 11:00 a.m. (T 585, DX I).

July 11, Wednesday.

9:49 a.m. Uranga called Lozano. They agreed to meet. Lozano said he was taking his pickup. Agreed to meet at 11:00 a.m. at McDonald's.

Unfortunately for Lozano, who was a heroin user, the agents were getting ready to sell him not heroin, but rather sham heroin. The only actual drug in the case was the one gram sample delivered to Lozano on June 27.

10:46 a.m. This was the meeting at McDonald's. The agents were actually desperate to make some sort of arrest, so they authorized Uranga to sell the four ounces of "heroin" for a $500 check written by Lozano on a Mexican bank. Lozano was then arrested. But during that last meeting between Lozano and Uranga it became clear that Lozano never met with REY and was entering into the transaction on his own against REY's advice.

URANGA: Well, didn't the lawyer lend you the money? Why didn't he give it to you?

LOZANO: No, well, he told me to go after six o'clock in the afternoon and I don't like to be given the run-around and I don't like to give it to other people nor do I like to get the heat. If they catch me in something like this they're gonna give me thirty years

* * *

URANGA: Why didn't the Lic. lend you the money?

LOZANO: Anyways, he said it was very little, the profit, and the risk was great, including for you, a damn big risk, if they catch you it's thirty years. (T 589-592 and GX 19)

So rather than go see REY, Lozano proceeded on his own. That is the only evidence on the issue of authorization. The next thing REY knew was that later, on the 11th, the agents went to REY's office and arrested him on these charges (TI 252, 594). REY testified that he

never dealt in drugs, never authorized Lozano to enter into the deal with Uranga, and never had illegal intent in this case (TI 330, 337, TI 253).

Office - Supreme Court, U.S
FILED
NOV 28 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-356

In the Supreme Court of the United States

OCTOBER TERM, 1983

JOSEPH J. REY, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D. C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Constitution and statutes:

U.S. Const. Amend. V (Due Process Clause) 3, 4

18 U.S.C. 4205(b)(2) 1

21 U.S.C. 846 1

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-356

JOSEPH J. REY, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that his conviction should be set aside because he was entrapped.

1. A jury in the United States District Court for the Western District of Texas convicted petitioner of conspiracy to possess heroin with intent to distribute it, in violation of 21 U.S.C. 846. Petitioner was sentenced to a maximum of four years imprisonment, with parole possible at any time in the discretion of the Parole Commission (see 18 U.S.C. 4205(b)(2)), and fined $5,000 (Tr. 974).

The evidence showed that petitioner, an attorney, was contacted by Alonzo Uranga, a former client, who asked for help with an immigration problem. During their conversation, petitioner asked whether Uranga "could get ahold of any drugs" (Pet. App. A2). Uranga reported this conversation to the Drug Enforcement Administration and agreed

to cooperate with the DEA. At the DEA's direction, Uranga had several conversations and meetings with petitioner. *Id.* at A2-A3.

In one recorded meeting, petitioner asked Uranga about the drugs. Uranga replied that he had available two kilograms, 65% pure, that would cost $45,000 each. Petitioner then said that because he was unfamiliar with drug transactions, he would ask an employee, Edmundo Lozano, who was more familiar with narcotics because he had been convicted of possessing heroin, to participate in the transactions. The next day, while petitioner watched from nearby, Lozano, Uranga, and a DEA agent posing as Uranga's supplier met to discuss the transaction. At this meeting, the "supplier" refused Lozano's request for a sample. Lozano reported these events to petitioner. Pet. App. A3-A4; Tr. 163-171, 240-243.

Petitioner subsequently spoke with Uranga and, in a recorded conversation, said that he had had the money ready while he watched the meeting and had been prepared to complete the purchase if Lozano had reported that the sample was of good quality (Tr. 330-337). Lozano later told petitioner that he had received a sample of high quality heroin from the supplier, and petitioner told Lozano to continue negotiations with Uranga (Tr. 185-186). Uranga subsequently contacted petitioner and told him that he had only a much smaller quantity of heroin available; but petitioner told Lozano to proceed with the transaction anyway in order to gain Uranga's confidence for future dealings (Tr. 188-189, 396-406). Lozano ultimately purchased heroin from Uranga (Tr. 150-152, 189-194, 425-433, 478-479).

2. Petitioner contends (Pet. 10-16) that this Court should review the court of appeals' decision in order to resolve a conflict among the circuits on the question whether a defendant may raise both an entrapment defense and some

inconsistent defense, such as a claim that he did not commit the acts charged. In this case, the court of appeals remarked that "[i]t is the law of this circuit that one may not claim he was entrapped into a criminal act without first admitting that he did in fact commit it"; for this reason, the court of appeals said, the entrapment defense was "not available to" petitioner (Pet. App. A5).

But even if petitioner is correct in saying that other circuits have adopted a different view, he is not entitled to relief, because he does not identify any way in which he was prejudiced by the court of appeals' rule. Despite that rule, petitioner was in fact allowed to raise his entrapment defense, and the jury was given an entrapment instruction (Tr. 923-924). That is the most petitioner could have obtained in any other circuit. The court of appeals, after noting that the defense should not have been available to petitioner, upheld the jury's rejection of it, explaining that "the evidence * * * is sufficient to support a rational conclusion that this crime had its birth in the mind of [petitioner,] not in any design implanted there by the government" (Pet. App. A5-A6).

3. Petitioner also asserts that there was no evidence of his predisposition (Pet. 19) and that the government's actions in investigating him were so outrageous that they violated the Due Process Clause and require that his conviction be set aside (Pet. 19-20). The court of appeals, while acknowledging that petitioner was "nagged" and that his "attitude appears to have been lukewarm" (Pet. App. A3), completely answered these contentions (*id.* at A6):

> To be sure, once the government learned that [petitioner] was seeking to buy drugs, it pursued offering him an opportunity to do so assiduously. Yet though he appered to blow hot and cold during that pursuit, [petitioner] — having broached the matter at the outset

> —met with the informant Uranga, procured an agent to pursue negotiations with him, expressed concern and the need for expert advice regarding price and quality of the drugs, and followed the transaction through conferences with his agent. We perceive no outrage.

Indeed, petitioner acknowledges that he engaged in all of these actions; he appears to assert only that he lacked the necessary intent. See Pet. 9[1] ("The evidence in the case was largely undisputed. Petitioner did contend lack of criminal intent * * * but he did not dispute the remainder of his involvement."). Apparently petitioner's contention at trial was that he was only gathering evidence to turn over to law enforcement authorities. See Pet. 7-8. The jury was given an instruction reflecting this defense. Tr. 924-925. But petitioner mentioned an intention to gather evidence and notify the authorities only once, to Lozano at the beginning of his negotiations, and at no other time throughout his dealings (Tr. 162-163). Petitioner never told the authorities about his extended course of negotiations even though, as a lawyer, he presumably knew how to do so. Indeed, there was testimony at the trial that petitioner had known a DEA agent for several years before the events in issue here and had had several contacts with him but never told him about the transaction (Tr. 673-675). In these circumstances, there is no reason for this Court to review the court of appeals' carefully considered determination that there was sufficient evidence of predisposition and that petitioner's conviction did not violate the Due Process Clause.

---

[1]In the copy of the petition served on the government, this page is misnumbered "15."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

NOVEMBER 1983

DOJ-1983-11